U.S. Department
of Transportation
**Federal Aviation
Administration**

November 1, 2000

Jeffrey M. Senger, Deputy Senior Counsel
for Dispute Resolution
United States Department of Justice
950 Pennsylvania Avenue, N.W. Rm. 4328
Washington, D.C. 20530

Dear Mr. Senger:

Enclosed are the comments of the Federal Aviation Administration (FAA) concerning the October 4th Notice in the Federal Register "Confidentiality in Federal Alternative Dispute Resolution Programs; Evaluation of Federal Alternative Dispute Resolution Programs." (Federal Register, Vol. 65, No.193, 10/4/2000.)

The FAA wants to commend the Steering Committee for developing the guidelines. The long-term success of agency ADR programs depends on an articulate and consistent application of the confidentiality provisions. The Steering Committee has provided an invaluable service to the Federal ADR community.

We also want to thank the Committee for allowing public comment given the stringent time frames the Committee is under to produce a final document.

If you have any questions concerning the enclosed comments, please contact Patricia Abdullah on my staff. Pat can be reached on (202) 267-8011.

Sincerely,

Jerome P. Jones
Dispute Resolution Specialist
Federal Aviation Administration

Enclosure

Comments of the Federal Aviation Administration

The Federal Aviation Administration (FAA) would like to comment on the Department of Justice/Federal Alternative Dispute Resolution Council Notice concerning Confidentiality in Federal Alternative Dispute Resolution Programs. (Fed. Reg. Vol. 65, No. 193; 10/4/00)

First we want to commend the Steering Committee (Committee) members for developing the guidelines. The long-term success of agency ADR programs depends on an articulate and consistent application of the confidentiality provisions. Confidentiality is a linchpin to ADR processes and the Steering Committee has provided an invaluable service to the Federal ADR community.

The focus of our comments is the Committee's interpretation of Section 574(b)(7).

In the Administrative Dispute Resolution Act of 1996 (Act), Section 574(b)(7) provides that:

> (b) A party to a dispute resolution proceeding shall not voluntarily disclose or thru discovery or compulsory process be required to disclose any dispute resolution communication, unless--
>
> (7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(5 U.S.C. 574(b)(7)).

In addition, "dispute resolution communication" is defined as:

> dispute resolution communication means any <u>*oral*</u> or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.

(emphasis added) (5 U.S.C. 571(5)).

Given the clear language in (b)(7) and the definition of "dispute resolution communication," a literal interpretation of 574(b)(7) means exactly what the Committee stated in its Notice:

> (1) There is no confidentiality protection for parties' dispute resolution communications that were available to everyone in the proceeding. For example, in a joint mediation session with all parties present, <u>*statements made*</u> and documents provided by parties are not confidential.

(*emphasis added*). Fed. Reg. Vol. 65, No. 193, p.59204

Although the Committee's interpretation is technically correct, the literal interpretation of the provision raises numerous concerns regarding the common understanding and practice of what has traditionally been treated as "confidential" in the general practice of mediation. Traditionally, statements made during a mediation session have always been considered confidential. *(See: Code of Virginia, Chapter 21.2 Section 8.01-581.22; American Arbitration Association: National Rules for the Resolution of Employment Disputes-Mediation, paragraph 12 Confidentiality, Effective June 1, 1996).* This is critical if the open and frank discussions that are intended to take place during mediation are to occur. More importantly, however, is the fact that an interpretation of (b)(7) that includes statements made during mediation sessions, renders the remaining six provisions of Section 574(b) meaningless. Anytime an interpretation of a word or phrase renders the remaining portions of a statute meaningless, ambiguity exists and clarification is required.

When ambiguity arises, the courts apply rules of statutory construction. When applying the rules, there are two fundament goals: (1) give effect to the legislative intent, and (2) interpret a statute so that all of its provisions work together in consistent and coherent manner. If a literal interpretation of one provision violates these goals, the courts freely abandon it and seek out an alternative interpretation that preserves the legislative intent and overall statutory scheme.

The following comments are an attempt to show that a literal interpretation of (b)(7) violates the two fundamental principles of statutory construction mentioned above. The comments will explain the purpose and intent Sections 574(a) and (b) and discuss the damage a literal interpretation of (b)(7) does to that portion of the statute. Following that discussion is a summary of the legislative history concerning (b)(7), which demonstrates the legislative intent to limit the (b)(7) exemption to documents, and to maintain the confidentiality of statements made during mediation sessions. The legislative history is especially important here because it supports an alternative interpretation of a term that is defined by the statute.

The Purpose and Intent of Section 574.

The purpose of Section 574 is to balance the need for confidentiality in ADR processes while protecting the public's right to access information generated in government proceedings. Several congressional committees struggled to find such a balance, and there is extensive discussion in the congressional record detailing the debate.

Section 574 creates limited exceptions to the premise that all dispute resolution communications are confidential. Therefore, any dispute resolution communications that is not covered by paragraphs (a), (b), (g), (h), or (I) are confidential. (Paragraphs (c), (d), (e), (f), and (j) are procedural in nature and do not discuss the type of information exempt from confidentiality). Our discussion is limited to Sections 574(a) and (b).

Section 574(a) concerns the neutral. Generally, the paragraph provides that a neutral shall not disclose or be required to disclose *any dispute resolution communication or any communication provided to the neutral in confidence.* Therefore, as concerns the neutral, all oral statements made during a joint session are confidential unless the statement is: agreed to by the parties to

be made public, has already been made public, required by statute to be made public, or is found by the court to be in the public's interest to be made public.

Section 574(b) concerns the parties. Again, the premise is that all dispute resolution communications are confidential unless they are covered by one of the enumerated exemptions.

In addition to the four exceptions discussed above under Section 574(a), (consent of parties, already public, required by statute, and public interest) there are three additional exemptions that apply to the parties--(b)(1), (b)(6), and (b)(7).

Section 574(b)(1) provides that a party may disclose his or her own statement. Given that the section is discussing disclosure within the context of party-to-party communications, the exemption is clarifying (rather than expanding) which information may be disclosed.

Section 574(b)(6) provides that a dispute resolution communication is not confidential if it helps to determine the existence or meaning of an agreement or award, or helps clarify how to enforce an agreement or award that results from a dispute resolution proceeding. Clearly, (b)(6) is referring to using the oral communication of another party for purposes of this exemption because the parties' own statements are already exempted under (b)(1). Furthermore, if the communication were a document that was given to one party from another, that document would not be confidential by virtue of (b)(7). Therefore, (b)(6) allows disclosure of discussions between or among parties during joint session only if necessary to determine the existence or meaning of a resolution agreement. Thus, Section 574(b)(6) recognizes that, generally, joint session discussions are confidential.

Section 574(b)(7) provides that except for dispute resolution communications generated by the neutral, any dispute resolution communication provided to or made available to all of the parties to the proceeding may be disclosed. Because the term "dispute resolution communication" is defined by the Act, we must read the provision using the term as defined. If read in this way, that provision means that any oral statements by a party, as well as any documents handed out by a party in joint session, are not confidential and may be disclosed. Thus, the only communications made by a party that continue to be confidential are the communications between a party and a neutral, which are covered in Section 574(a).

Effect of Literal Interpretation of Section 574(b)(7).

If read literally, (b)(7) has the following effect on the remaining provisions in Section 574(b). First, Section 574(b)(1) is only necessary if there are party-to-party communications that are confidential. The provision is clarifying; it does not expand the confidentiality provisions. Since a literal reading of (b)(7) wound render all party-to-party communications public, then (b)(1) is unnecessary.

Section 574(b)(2) is rendered meaningless because if all of the parties must consent to disclose the communication that means that all of the parties have knowledge of the communication, in which case consent is not necessary because the communication is not confidential.

Sections 574(b)(3),(4), and (5) could be sufficiently addressed under Section 574(a). By themselves, they do not warrant an additional paragraph in the section.

Finally, Section 574(b)(6) is senseless if (b)(7) is interpreted to include oral statements. Under (b)(1), a party can disclose his or her own dispute resolution communication. The dispute resolution communications that are left for (b)(6) to address are those of the other parties. Since (b)(7) makes such dispute resolution communications public, (b)(6) is unnecessary.

Therefore, if (b)(7) is read literally, the only dispute resolution communications that remain confidential are those covered by Section 574(a). Thus, a literal interpretation of the term "dispute resolution communication" as defined by the Act, cannot be what Congress intended in Section 574(b)(7).

Precedent for Applying Rules of Statutory Construction Even When Statutory Language is Clear.

The purpose of all rules of statutory construction or interpretation is to discover the true intention of the law. And, it is a fundamental principle that the rules of construction are applied only when the statute is unclear or ambiguous. In this case, there is ambiguity caused by the literal interpretation of "dispute resolution communication." Some would argue that given that the term "dispute resolution communication" is defined by the Act, there is no need to go any further to ascertain legislative intent. However, this has not been the position of the Court when to do so would fail to give effect to other provisions in a statute clearly intended to have meaning. That is exactly what the literal interpretation of (b)(7) does; it undermines the basic premise of the section, i.e., confidentiality between the parties, and it renders meaningless the six previous provisions of the section.

It is fundamental that where the literal reading of a statute would compel an odd result other evidence of legislative intent must be searched to lend a term its proper scope. *Public Citizen v. United States Department of Justice, et al., 491 U.S. 440; 109 S. CT. 2558 (1989)*. Moreover, the Court has a long history of interpreting statutes harmoniously, giving effect to all the provisions of a statute. *Weinberger v. Secretary of Health, Education, and Welfare, et al. v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609; 93 S. Ct. 2469 (1973); Jarecki, Former Collector of Internal Revenue, et al. v. G. D. Searle & Co., 367 U.S. 303; 81 S. Ct. 1579 (1961); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204; 52 S. Ct. 322 (1932)*.

In this case, applying the definition of "dispute resolution communication" as defined by the Act clearly presents a very odd result. To have six previous provisions rendered meaningless by the last provision clearly warrants the committee to review the legislative history to better determine legislative intent and, if possible, to interpret (b)(7) in a way that gives meaning to all of the provisions in Section 574(b).

Legislative History

In 1990, there was a significant amount of discussion concerning the confidentiality provisions of the ADR Act. These discussions continued right up until the time the Act was passed. The

amendments to the confidentiality provisions came from Senators Kohl and Leahy and, although the amendments were controversial, they were accepted for the purpose of getting the legislation enacted. However, it was understood that the subject of confidentiality was not resolved and that the confidentiality provisions would be revisited in the next Congress. (136 Cong Rec S 18082, 18088.)

The amendments introduced by Kohl and Leahy were submitted together and the purpose of the amendments was to address the issue of documents in ADR processes. When his and Senator Leahy's amendments were introduced, Senator Kohl stated:

> Still, we must recognize that for mediation and arbitration to be effective there must be a degree of confidentiality. Parties cannot negotiate candidly if *settlement offers and certain other internal documents* are subject to later release. Indeed, very few parties would even elect to use an alternative dispute resolution procedure if that were the case.
>
> My amendment strikes the proper balance between disclosure and confidentiality. Under this bill, as amended, only dispute resolution communications may be kept confidential by the parties. *Such communications do not include anything that existed before the beginning of the resolution process.* An[d] my amendment makes clear that the terms of final awards and settlements also cannot be shielded from disclosure. . . . .

(*emphasis added.*) (136 Cong Rec S 18089.)

Additional comments were made concerning the Kohl/Leahy amendments by the bill's sponsor, Senator Levin. When introducing the legislation before the Senate for a vote, Senator Levin states:

> Finally, let me add that there has been concern and some confusion *about the extent to which documents used in and prepared for ADR proceedings are to be kept confidential* -- that is, they are not to be voluntarily disclosed or released 'through discovery or compulsory process.' Under the terms of Senator Kohl's amendment, the bill would treat only those documents prepared for purposes of an ADR proceeding as dispute resolution communications subject to these confidentiality provisions. Thus, a preexisting document would not be covered. *Senator Leahy's amendment would exclude from that confidentiality restriction, moreover, any such documents which are made available to all parties -- as in an arbitration proceeding.*

(*emphasis added.*) (136 Cong Rec S 18088.)

When the Senate introduced S. 1224 reauthorizing the 1990 Act, it deleted (b)(7). In the Senate report the committee states:

. . . . Second, S. 1224 eliminates section 574(b)(7), which removed all confidentiality protection from *documents that were provided to all parties* to an ADR proceeding. There appears to be no sound reason why the Acts' confidentiality protection *should not apply to such documents*.

By eliminating this exception, S. 1224 will promote open communication between the parties to a dispute, which is often necessary to resolve contentious issues.

(*emphasis added.*) (S Rep 104-245).

However, in the corresponding House bill, (b)(7) was amended and the clause "except for dispute resolution communications generated by the neutral," was added. The amendment is explained by Representative Reed as follows:

> H.R. 41[9]4 also enhances the confidentiality provisions of the ADR statute. The bill provides that *a document generated by a neutral and provided to all parties is exempt from discovery under section 574(b)(7),* as well as from disclosure pursuant to FOIA. This change will facilitate the use of early neutral evaluation and similar ADR processes that provide an outcome prediction to both sides. Parties are understandably reluctant to subject themselves to the risk of the neutral's opinion, which is not based on full discovery, being used against them at trial later. . . .

(*emphasis added*) (142 Cong Rec H 11449)

It is clear from the legislative history that all concerns about exceptions to confidentiality centered around prepared documents. There is no mention of forced disclosure of the oral communications that are at the very heart of the mediation process.

Conclusion.

The goal of Section 574 is to preserve the confidentiality of the dispute resolution process for the purpose of encouraging the Federal government to engage in ADR. A reasonable interpretation of (b)(7) must harmonize with the section's goals of preserving confidentiality. A statute that is intent on accomplishing a specific goal should not be read to create disincentives for the very subject Congress is attempting to promote. *Commissioner of Internal Revenue v. Engle et ux., 464 U.S. 206; 104 S. Ct. 597 (1984)*. Moreover, there is no indication in the legislative history that Congress intended to change the commonly understood and practiced principle that the open and frank discussions that take place between the parties during a dispute resolution proceeding are confidential. On the contrary, Congress was working very hard to preserve that principle. Therefore, the Committee should limit its interpretation of the term "dispute resolution communication" in (b)(7) to written documents only. This interpretation would effectuate the legislative intent clearly explained in the legislative history and it would ensure that the Act is applied in a consistent and coherent manner.